**LEE TAIN TSHUNG**

**v.**

**HONG LEONG FINANCE BHD. & ORS.**

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[ORIGINATING SUMMONS NO. K. 42 OF 1990]
27 SEPTEMBER 1991

***LAND LAW:*** *Sale by public auction - Application to set aside - Whether void ab initio - No difference in sale by sheriff or sale by landowner - Sale of native land to non-native - Whether illegal - Whether delay of 55 minutes in commencing auction fatal - Rules of the High Court 1980, O. 47 rr. 6(3), 7(e), 22 - Sabah Land Ordinance, ss. 17(1), (2), (4), 64.*

The plaintiff took out an originating summons for an order to set aside the sale by public auction of the plaintiff's immovable properties (the said properties) conducted under the supervision of the 2nd defendant, D2, on 5 May 1990. One of the properties had a native title. Prior to this, on 3 May 1990, the plaintiff had applied by way of summons- in-chambers for the setting aside of the Senior Assistant Registrar's order in relation to the fixing of the reserve price by the Court. This application was dismissed.

It was argued by the plaintiff that the sale was void *ab initio* under s. 17(1) of the Sabah Land Ordinance (the said Ordinance) as it was tainted with illegality as a result of material irregularities in the conduct of the public auction. Further, it was alleged that the invalidity of the sale of the said properties also invalidated the sale of two other associated properties as they were all to be sold together as one property. The auction commenced at only 9.55 a.m. on 5 May 1990.

The defendants have applied under O. 18 r. 19 of the Rules of the High Court 1980 to strike out the plaintiff's originating summons.

**Held:**

**[1]** A sale by the sheriff and a sale by the owner of the land himself, was a sale in any way; in both cases, registration will still have to be effected and in either case, a sale would have taken place.

**[2]** The delay of 55 minutes was not fatal and the sales of non-native lands is confirmed.

**[3]** However, the sale of the native title land, to a non-native, is invalidated and is set aside as the provisions of ss. 17(1), (2), (4) and 64 of the Ordinance have not been complied with.

*[Order accordingly.]*

**Legislation referred to:**
Land Ordinance (Cap 68) (Sabah), ss. 17(1), (2), (4), 64
Rules of the High Court 1980, O. 18 r. 19, O. 46 r. 22, O. 47 rr. 6(3), 7(e)

*For the plaintiff - Sugumar Balakrishnan; M/s. Sugumar & Co.*
*For the 1st defendant - Wong Suk Anne (Mathew Willie with him); M/s. Skinner Lind Robertson Willie Wong & Chin*

**JUDGMENT**

**Syed Ahmad Idid JC:**

The hearing on 19 August 1991 was on the application under O. 18 r. 19 to strike out the originating summons dated 2 June 1990 where the plaintiff had sought for:

(a) An order to set aside the sale by public auction of the plaintiff's immovable properties conducted under the supervision of the 2nd defendant on 5 May 1990 at the High Court building, Kota Kinabalu.

(b) The costs of this application be costs in the cause;

(c) Further or other relief as this Honourable Court deems fit.

The evidence of both parties were based on originating summons dated 2 June 1990, the summons-in-chambers dated 8 April 1991, affidavits of Ng Kwong Meng and Albert Francis sworn on 4 April 1991 and 8 April 1991 respectively. Mr. Sugumar, for plaintiff, had applied to discontinue action against all defendants except 1st defendant.

From the affidavit affirmed on 1 June 1990, plaintiff was:

(a) advised and believed that there had been material irregularity in the conduct of the public auction sale: (para. 20)

(b) of the belief that substantial injury was caused to him by reason of the alleged irregularity: (para. 21)

(c) of the belief that if the auction sale had been held at the stipulated time of 9 a.m.:

(i) the properties would have fetched higher prices; (paras. 12, 15, 18, 23, 24)

(ii) he could receive surplus after satisfying the judgment; (paras. 24, 26)

(iii) the other properties could have been sold since many potential bidders had already left by 9.55 a.m.: (paras. 25, 26).

(d) advised and believed that by reason of irregularity in the conduct of the auction. Plaintiff had been deprived of the opportunity of:

(i) obtaining a better price for the properties;

(ii) having all his properties sold at the auction;

(iii) having the judgment satisfied; and

(iv) getting a surplus from the sale proceeds; and

(e) of the belief that plaintiff sustained substantial injury and irreparable loss under the circumstances.

The plaintiff's supplementary affidavit affirmed on 14 August 1991, added other grounds, namely:

(a) that the sale by public auction of NT 6154 to Otentik Sdn. Bhd. was void *ab initio* by virtue of s. 17(1) of the Land Ordinance (Sabah Cap 68);

(b) that the invalidity of the sale of the said NT also invalidated the sale of CL 81446 and CL 8646 because they were to be sold together as one property.

By the 2nd and 3rd supplementary affidavits, affirmed also on 14 August 1991, the plaintiff's two Counsel, Mr. Sugumar and Mr. P.K. Lim, both denied that they made an application to the Court on the morning of the auction which led or caused the delay of the commencement of the auction (which commenced only at 9.55 a.m. that day).

***Illegality - Sale of Native Land***

Mr. Sugumar confirmed that the plaintiffs grievance was not against the prohibitory order. What plaintiff contended was that the sale by public auction on 5 May 1990 was tainted with illegality. The sale by 1st defendant of the native land went against s. 17(1) of the Land Ordinance (Sabah Cap 68). On this the 1st defendant agreed that the successful purchaser Otentik Sdn. Bhd. was not a "native". I therefore did not go into the case of *Manang Selaman Ak Nyalau v. Manang Lim Native Sdn. Bhd.* [1986] 1 MLJ 312 (or the Supreme Court Report at [1986] 1 MLJ 379) as the defendant had already accepted that.

Nevertheless, 1st defendant contended that a prohibitory order (PO) was not a dealing.Order 47 r. 6 describes a "prohibitory order as a writ of seizure and sale of immovable property". Order 47 r. 6(3) says that no prohibitory order shall affect any immovable property or registered interest therein.

(Order 47 r. 6(3)):

> No prohibitory order issued under this rule shall affect any immovable property or registered interest therein and no immovable property or registered interest therein shall be deemed to have been seized until such prohibitory order shall have been registered as provided by any written law relating to such land.

A "dealing" under the Land Ordinance "means any transaction of whatever nature by which land is affected under this Ordinance." This should erase any misconception in this respect.

Defendant, on the other hand, claimed that the sale by the Sheriff of the High Court was of an interest in land belonging to a judgment debtor that had been seized or attached by way of a PO issued by the Court to a judgment creditor to satisfy a judgment obtained against that judgment debtor. As this was pursuant to a writ of seizure and sale, it was not a sale by the registered owner pursuant to a voluntary act or agreement to sell.

Despite O. 46 r. 22, I am of the opinion that a sale by the Sheriff and a sale by the owner of the land himself was sale any way and the two are not different. In both cases the registration will still have to be effected. On this, I accepted Mr. Sugumar's arguments that in either case, a sale would have taken place.

The three pieces of land were sold together but only one was a native title with a reserve price of RM432,000. Exh. 'C' of the originating summons - Azmi Smiths Gore gave the open market valuation at RM2.35 million but that valuation covered both the land and the ongoing business. According to Miss Anne Wong, it was plaintiff's valuers' report which recommended the sale of the three titles as a going concern as the three are contiguous plots. Stone reserves run the three titles. Miss Anne said it was plaintiff who requested to sell all three together and now later he claimed they should not be sold together.

***Delay***

As to the delay in the auction, Mr. Sugumar said plaintiff had no recourse to stop it. Order 47 r. 7(e). Read also para. 4(b)(iv) of Ng Kwong Meng's affidavit. There was no stay of the auction on 5 May 1990 as there was no application. Mr. Sugumar also submitted that "time was of the essence" whereas Miss Wong had earlier stated that a delay of 55 minutes

was not fatal. Mr. Sugumar referred to the Exh. 'B' - clearly stated the date and time "9 a.m.". This was notice to the public and so Mr. Sugumar concluded that "55 minutes cannot be deemed to be reasonable". He submitted that in:

(i) *McHugh v. Union Bank of Canada* [1913] AC 299:

> Their Lordships agree with the judgment of the Supreme Court of Canada on this point. It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold, and

(ii) *Cuckmere Brick Co. Ltd. & Anor. v. Mutual Finance Ltd.* [1917] 2 All ER 633 at Held (i):

> ... in exercising the power of sale, however, the mortgagee was not merely under a duty to act in good faith, that is, honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it.

Mr. Sugumar informed the Court that the defendants failed to get a fair value for the land and that by conducting the action at 9.55 a.m. they failed in their duty. The same judgment Mr. Sugumar had cited has this to say:

> A mortgagee was not a trustee of the power of sale for the mortgagor and, where there was a conflict of interests, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale.

in *Cuckmere Brick Co. Ltd. & Anor. v. Mutual Finance Ltd. (supra).* Time was left to the discretion of the mortgagee (or in our case, also called the debtor).

What exactly did take place in this episode? Let us go back into history. The background leading to the plaintiff's application to the learned Judge on the morning of 5 May 1990 was that:

(i) Order for sale of the properties in question had been granted by the SAR on 10 March 1990;

(ii) on 3 May 1990, two days before the auction, the plaintiff applied by his summons-in-chambers dated 25 April 1990 to Mr Justice Datuk Charles Ho for an order to set aside the order of the Senior Assistant Registrar dated 10 March 1990 (plaintiff's Exh. 'A') on the ground *inter alia* that the reserve price fixed by the Court did not reflect the forced sale values recommended by his valuers. The plaintiff's application was heard and dismissed on that day.

(iii) By a letter dated 3 May 1990 the plaintiff's solicitors applied for further argument of their application.

(iv) As confirmed by the affidavits of both Mr. Sugumar and Mr. Lim, the certificate of no further argument was dated 21 May 1990. This could mean that on the day of the auction *viz*: 5 May 1990, an attempt(s) may have been made by the plaintiff to get a decision on his application. If so this may have contributed to the delay in starting the auction (but this was merely on extraneous factor and cannot tilt the decision either way).

The following facts, according to Miss Wong:

(i) that the interested bidders stayed for about 55 minutes to bid at the auction sale;

(ii) that five out of seven properties (three of which were sold as one property) were sold;

(iii) the remaining two properties that were not sold at the auction consisted of the home of the plaintiff and an undivided 13/100th share of the plaintiff;

(iv) that all of the properties sold were sold at prices above the reserve prices and such were the best under the market conditions prevailing then;

(v) that the same properties had been put up for sale by public auction once on 3 December 1989 at the reserve prices which were based on the highest recommended forced sale values, on a comparison between the reports by Messrs Azmi Smiths Gore (produced to the Court by the plaintiffs) with the reports by CH Williams Talhar and Wong (produced by the 1st defendant to the Court);

together went to show that the delay was not material and further that the plaintiff did not sustain any injury by reason of such delay. If injury was caused, there was neither proof nor evidence of it.

Miss Wong informed the Court that the events following the auction in question:

(a) an application for confirmation of sale filed on 11 June 1990 and mentioned on 27 August 1990;

(b) O.S. K42 filed on 2 June 1990 but served on 1st defendant's solicitors only 22 January 1991;

(c) This summons-in-chambers filed on 8 April 1991.

would show that the plaintiff had delayed serving the originating summons on the 1st defendant by about eight months from the time of its issuance and failed to take out the notice of appointment since the 1st defendant's service on them of the memorandum of appearance. This proved that the purpose was to delay the confirmation of the sale.

***Conclusion***

(a) On the strength of *Cuckmere Brick CB Ltd. & Anor. v. Mutual Finance Ltd. (supra)* and other facts relevant to that auction held on 5 May 1990, I rule that the delay of 55 minutes was not fatal and so I cannot accept plaintiff's application to set the sale aside.

(b) There seems however to be some merit on the arguments regarding:

(i) Section 17(1) of the Land Ordinance which forbids dealings in land between non-natives and natives ... except with the written permission of the Minister. Section 17(2) provides that any non-native desirous of purchasing land from a native should address his application to the Secretary of Natural Resources.

(ii) Section 17(4) appears to be relevant in that a native can lawfully execute a memorandum of charge over Part IV (Native Lands) land in favour of "Sabah Credit Corporation ... or any bank ... or any other company or body corporate ... and such person, that is, the corporation, bank or other company (and the 1st defendant being one) may exercise all the rights and powers ... and may transfer its interests - or cause the land to be transferred to **any such persons**." This will not make it possible for the successful bidder to purchase the NT land as the auction had preceded the application. But even here the Ordinance cannot favour the successful bidder (who is a non-native) because the transfer must have "regard to the conditions of title." And s. 64 is clear that "no non-native may purchase any land ... unless in accordance with s. 17". I therefore rule that the sale of the NT land (NT 6154) to Otentik Sdn. Bhd. not being a **native**, is invalidated and is set aside.

(iii) The sales to the other bidders and of the two other pieces of land, not being NT land, are confirmed.

(c) In the premises, the defendant's summons-in-chambers dated 8 April 1991 is granted to the extent that NT 6154 is excluded, with costs, and I order accordingly.

Also found at [1991] 3 CLJ 2876